



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/500,735	07/01/2004	Adrian Kawa	212/598US	6835

7590 08/10/2006
K David Crockett
Crockett & Crockett
Suite 400
24012 Calle de la Plata
Laguna Hills, CA 92653

EXAMINER

STULII, VERA

ART UNIT PAPER NUMBER

1761

DATE MAILED: 08/10/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/500,735

Applicant(s)

KAWA ET AL.

Examiner

Vera Stulii

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☒ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date ____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: ____.

DETAILED ACTION***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-20 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-3, 5-12, and 14-16 of copending Application No. 10/038269 in view of Yoko et al. (US 6,482,456).

Both application claim a method of flavoring sake with fresh produce comprising the steps of: contacting a quantity of sake with a quantity of finely divided fresh produce to form a produce sake mixture; aging the produce sake mixture at a reduced temperature (between 33°F and 50°F) for a predetermined time; separating the aged produce sake mixture into raw flavored sake and insoluble material; subjecting the raw

Art Unit: 1761

flavored sake to a rapid pasteurization process to produce pasteurized flavored sake; and adding a preservative to produce fully stabilized flavored sake.

Both applications claim a method of flavoring sake with whole produce concentrate comprising the steps of: contacting a quantity sake with a quantity of whole produce concentrate; blending the whole produce concentrate and the sake to form a produce sake mixture; subjecting the produce sake mixture to a rapid pasteurization process to produce pasteurized flavored sake; and adding a preservative to the pasteurized flavored sake to produce fully stabilized flavored sake, separating insoluble material from the produce sake mixture prior to the step of subjecting to a rapid pasteurization process. Both applications claim that at least one of the steps of contacting and blending, separating is carried out at a reduced temperature (between 33°F and 50°F).

Both applications claim the rapid pasteurization process is selected from the group consisting of flash pasteurization and tunnel pasteurization. Both application claim the preservative is selected from the group consisting of sulfur dioxide, sodium sulfite, potassium sulfite, potassium sorbate, sodium sorbate, potassium benzoate and sodium benzoate, wherein the preservative further includes a material selected from the group consisted of ascorbic acid, ascorbic acid derivatives, citric acid citric acid derivatives, malic acid and malic acid derivatives.

Application '296 does not recite that the fresh produce is selected from the group of fruit, vegetables, herbs and spices (claim 4, 19 of App. '735). Application '296 does not recite that the fresh produce concentrate is selected from the group of fruit

Art Unit: 1761

concentrate, vegetable concentrate, herb concentrate and spice concentrate (claim 13 of App. '735). However Application '296 does recite "contacting a quantity of sake with a quantity of finely divided **fruit** to form a produce sake mixture" (claim 1, App. '296), and "contacting a quantity of sake with a quantity of whole **fruit** concentrate" (Claim 7, App. '296).

Application '296 does not recite the hot fill pasteurization. However, as evidenced by Yoko et al. (US 6,482,456) hot fill pasteurization is known to be used in production of sweet drinks made from fermented rice (sake) (Col.2, Lines 62-63). Therefore, it would have been obvious to modify Application '296 and employ hot fill pasteurization step in order to kill enzymes and yeast and to keep sake in balance.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.

Art Unit: 1761

2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over **New York Times**, **sake-world.com**, **winebusiness.com**, **Journal of the Society of Brewing**, and Blyth et al. (US 2001/0055646).

In regard to claim 1, **New York Times** (p.3) discloses contacting a quantity of sake with a quantity of finely divided fresh produce (peaches cut in half) to form a produce sake mixture, aging the produce sake mixture at a reduced temperature for a predetermined time ("refrigerate 24 hours), separating the aged produce sake mixture into a raw flavored sake and insoluble material ("strain sake through cheesecloth into clean decanter"). Claim 1 also recited subjecting the raw flavored sake to a rapid pasteurization process. **New York Times** is silent about subjecting the raw flavored sake to a rapid pasteurization process. However, as evidenced by **sake-world.com** (p.2) and **winebusiness.com** (p.5), pasteurization of sake is notoriously conventional. Therefore, it would have been obvious to modify **New York Times** and employ pasteurization step in order to keep sake in balance if it is not kept cold (**sake-world.com** (p.2)).

Claim 1 also recites adding a preservative to produce fully stabilized flavored sake. **New York Times** is silent about adding a preservative. However, **Journal of the Society of Brewing** teaching adding preservatives to sake in order to reduce coloration and off-flavor. Therefore, it would have been obvious to modify **New York Times** and employ a preservative in order to prevent discoloration and development of off-flavor.

Art Unit: 1761

In regard to claim 2, New York Times (p.3) discloses aging the produce sake mixture under refrigeration conditions. Claim 2 recites specific range of temperatures (between 33° F and 50° F). It is well known that refrigerator temperatures (35° F-38° F preferred) are in the range recited in claim 2.

In regard to claim 3, New York Times is silent about using flash or tunnel pasteurization. However, **winebusiness.com** teaches, " A non-chemical alternative upon which diaries and sake makers have long relied is flash pasteurization" (p.5). Therefore, it would have been obvious to modify New York Times and employ flash pasteurization in order to maintain microbial stability as taught by **winebusiness.com**.

In regard to claim 4, New York Times teaches infusing sake with peaches.

In regard to claim 5, Blyth et al. (US 2001/0055646) teaches that potassium sorbate is well known preservative and is used in fruit and vegetable products including wine (p.1, Par.5). Therefore it would have been obvious to modify New York Times and employ potassium sorbate as a mould and yeast inhibitor.

In regard to claim 6, Journal of the Society of Brewing teaching adding ascorbic acid to sake in order to reduce coloration and off-flavor. Therefore, it would have been obvious to modify New York Times and employ ascorbic acid in order to prevent discoloration and development of off-flavor.

Claims 7-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nagao et al. (JP 407059553), New York Times, **winebusiness.com**, Journal of the Society of Brewing, and Blyth et al. (US 2001/0055646).

Art Unit: 1761

In regard to claim 7, Nagao et al. (JP 407059553) discloses contacting a quantity of sake with a quantity of whole produce concentrate (Abstract), blending the whole produce concentrate and the sake to form a produce sake mixture (Abstract), subjecting the produce sake mixture to a rapid pasteurization process (Abstract). Claim 7 also recites adding a preservative to produce fully stabilized flavored sake. Nagao et al. is silent about adding a preservative. However, Journal of the Society of Brewing teaching adding preservatives to sake in order to reduce coloration and off-flavor. Therefore, it would have been obvious to modify Nagao et al. and employ a preservative in order to prevent discoloration and development of off-flavor.

It regard to claims 8 and 9, Nagao et al. do not disclose specific contacting/blending temperatures. However, as evidenced by New York Times (p.3) it is well known in the art to perform aging/blending under reduced temperatures in the range recited in claim 9. Therefore, it would have been obvious to modify Nagao et al. and employ low temperatures during the blending step as taught by New York Times.

In regard to claim 10, Nagao et al. fail to teach separating insoluble material from the produce sake mixture. However, New York Times (p.3) teaches separating insoluble material from the produce sake mixture. Therefore, it would have been obvious to modify Nagao et al. and employ the step of separating insoluble material from the produce sake mixture as taught by New York Times.

In regard to claims 11 and 12, Nagao et al. do not disclose specific contacting/blending/separating temperatures. However, as evidenced by New York Times (p.3) it is well known in the art to perform aging/blending under reduced

Art Unit: 1761

temperatures in the range recited in claim 12. Therefore, it would have been obvious to modify Nagao et al. and employ low temperatures during the blending step as taught by **New York Times**.

In regard to claim 13, Nagao et al. teaching use of fruit concentrate (Abstract).

In regard to claim 14, Nagao et al. do not disclose potassium sorbate. However, Blyth et al. (US 2001/0055646) teaches that potassium sorbate is well known preservative and is used in fruit and vegetable products including wine (p.1, Par.5). Therefore it would have been obvious to modify Nagao et al. and employ potassium sorbate as a mould and yeast inhibitor.

In regard to claim 15, Nagao et al. do not disclose adding ascorbic acid to sake.

Journal of the Society of Brewing teaching adding ascorbic acid to sake in order to reduce coloration and off-flavor. Therefore, it would have been obvious to modify Nagao et al. and employ ascorbic acid in order to prevent discoloration and development of off-flavor.

In regard to claim 16, Nagao et al. do not disclose flash or tunnel pasteurization.

However, **winebusiness.com** teaches "A non-chemical alternative upon which diaries and sake makers have long relied is flash pasteurization" (p.5). Therefore, it would have been obvious to modify Nagao et al. and employ flash pasteurization as a well-known method.

Art Unit: 1761

Claims 17-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over **New York Times**, Yoko et al. (US 6,482,456), **media-akita.or.jp**, and Blyth et al. (US 2001/0055646).

In regard to claim 17, **New York Times** (p.3) discloses contacting a quantity of sake with a quantity of finely divided fresh produce (peaches cut in half) to form a produce sake mixture, aging the produce sake mixture at a reduced temperature for a predetermined time ("refrigerate 24 hours), separating the aged produce sake mixture into a raw flavored sake and insoluble material ("strain sake through cheesecloth into clean decanter"). Claim 17 also recited subjecting the raw flavored sake to a hot fill pasteurization process. **New York Times** is silent about subjecting the raw flavored sake to a hot fill pasteurization process. However, as evidenced by Yoko et al. (US 6,482,456) hot fill pasteurization is known to be used in production of sweet drinks made from fermented rice (sake) (Col.2, Lines 62-63). Therefore, it would have been obvious to modify **New York Times** and employ hot fill pasteurization step in order to keep sake in balance.

In regard to claim 18, which recites specific hot-fill pasteurization temperature between 140° F to 150° F, **media-akita.or.jp** (p.2) teaches that sake is pasteurized at 65° C, which is in the range recited by applicant. Therefore, it would have been obvious to modify **New York Times** and employ hot fill pasteurization temperatures taught by **media-akita.or.jp** in order to kill the enzymes and yeast.

In regard to claim 19, **New York Times** teaches infusing sake with peaches.

Art Unit: 1761

In regard to claim 20, Blyth et al. (US 2001/0055646) teaches that potassium sorbate is well known preservative and is used in fruit and vegetable products including wine (p.1, Par.5). Therefore it would have been obvious to modify New York Times and employ potassium sorbate as a mould and yeast inhibitor.

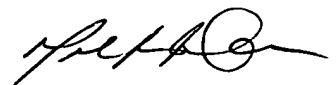
Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Vera Stulii whose telephone number is (571) 272-3221. The examiner can normally be reached on 7:00 am-3:30 pm, Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

vs *V. Stulii*


WILLIAM H. GOSS
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 1700